TULARE COUNTY SUPERIOR COURT
STATE OF CALIFORNIA
APPELLATE DEPARTMENT

Mark Trinkle, dba Trinkle Ag Plaintiff, Respondent, vs. California Department of Pesticide Regulation Respondent, Appellant, The People of the State of California and Does 1 to 25, Real Parties in Interest.	Case No.: VCL04-100206 DECISION ON APPEAL

The Honorable Glade Roper, Presiding Judge of the Appellate Division, and the Honorable Gerald Sevier and the Honorable Joseph Kalashian, sitting by special assignment of the Honorable Ronald George, the Chairperson of the Judicial Council.

FACTS

An administrative hearing was held September 11, 2003 before Dennis C. Plann, Deputy Agricultural Commissioner/Sealer of the Fresno County Department of Agriculture as hearing

officer. At the hearing evidence was presented by Douglas Edwards, Roger L. Taff and Clifford Francone of the Fresno County Department of Agriculture; Steve Schweizer of the Kings County Department of Agriculture; and Mark Trinkle[1], doing business as Trinkle Ag Flying Service. The oral evidence presented at the hearing can be summarized as follows:

1. Castemagna Farms, was growing onions in a field.

2. On January 22, 2003 Petitioner sprayed the herbicide paraquat on a field designated 19-1, located a half-mile to the East of the onion field.

2. Six days later, January 28, Blair sprayed the herbicide Pursuit on an alfalfa field immediately to the North of the onion field. Gary Minnetti[2], who works for Castemagna Farms, saw it drift toward his onions and called the Agricultural Commissioner to complain.

3. January 29th Francone, a Supervising Agricultural/Standards Specialist, met with Minnetti at the onion field and noticed yellowing and spotting of the onions. The yellowing was not necessarily the result of an herbicide.

4. February 5th someone was spraying the field immediately to the East of the onions. Minnite told Francone that it was Petitioner spraying paraquat. Petitioner denied that he sprayed paraquat on that field. Francone collected samples of the plants. Paraquat was found on the plants. The amount found on the onions seems to indicate that spray went from northeast to southwest.

5. No other applications of paraquat were reported in the vicinity of the onions.

6. The onions were yellowed or spotted, but grew and were harvested.

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[1]Petitioner is incorrectly referred to as "Mark Twinkle, dba Twinkle Ag" in the Decision Granting Writ filed May 4, 2004.

[2]The name is spelled as "Minnite" in the transcript of the oral testimony and in reports by Francone at pages 83 and 84 of the certified transcript.

7. The wind was blowing away from the onion field the day Trinkle sprayed paraquat on field 19-1.

8. Pursuit would not be detectable on plants more than 20 minutes after application.

In addition to the oral evidence, a number of documents and photographs were submitted as exhibits. Among those documents is a report from Francone, designated page 83 in the certified record, which indicates that on January 28 Minnetti told Francone that he would "keep an eye on the field for the next five days to see if damage does appear. If there is damage, he will file a report of loss."

Following the hearing, the Commissioner of Agriculture imposed a fine of $500 against Trinkle. Trinkle appealed to the Director of the Department, who affirmed the decision. Trinkle then filed a petition for writ of mandate with the Tulare County Superior Court. On May 4, 2004 the Superior Court granted the petition of Mark Trinkle, for a Writ of Administrative Mandamus, and ordered the California Department of Pesticide Regulation (Department) to vacate its finding that Trinkle had violated Food and Agriculture Code §12972[3] and the fine imposed on Trinkle as a result of that violation. The Department appeals the judgment and asserts that the Court abused its discretion.

STANDARD OF REVIEW

The trial court found that the imposition of a fine is purely economic, and thus it does not affect a fundamental vested right. The standard of review for the trial court was whether there is any substantial evidence to support the finding of the administrative hearing officer.

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[3]Food and Agriculture Code § 12972 read as follows: "Prevention of drift to nontarget areas. The use of any pesticide by any person shall be in such a manner as to prevent substantial drift to nontarget areas." Although "paraquat" is defined in the dictionary as an "herbicide" rather than a "pesticide," Section 13190 defines "herbicide" as a "pesticide."

When the trial court's review of the agency action is under the substantial evidence standard, the trial court and the appellate courts occupy essentially identical positions with regard to the administrative record to determine whether, as a matter of law, the agency's findings are sufficient and whether those findings are supported by substantial evidence. The appellate court applies the substantial evidence test in light of the whole record, to determine whether or not the findings are supported by the evidence to determine whether or not the Agency abused its discretion. [Miller v. Board of Supervisors (1981) 122 Cal. App. 3d 539, 543; Sierra Club v. City of Hayward (1981 28 Cal. 3d 840, 849; CCP § 1094.5(b). (Code of Civ. Proc., §1094.5, subd. (b); " (California Administrative Mandamus, (Cont. Ed. Bar 2003) § 6.127, p. 247-248.)

DISCUSSION

Upon appeal, we consider anew whether the Department's findings were based on substantial evidence. Reasonable doubts on conflicting evidence must be resolved in favor of the Department, and it is presumed that the Department's actions were supported by substantial evidence. The Departments findings will not be overruled unless they are found to be clearly erroneous.

The Department asserts two errors by the trial court. First, it is claimed that "the trial court impermissibly engaged in a reexamination of wind pattern evidence previously considered by the Commissioner at the September 11, 2003 hearing." The Department asserts that the hearing officer "discounted" the wind evidence.

There is no indication from the ruling of the hearing officer that the wind evidence was considered and discounted. In fact, no reference is made in the decision to the undisputed wind direction evidence submitted by Trinkle. Although the trier of fact is free to disregard any evidence found to be irrelevant or unpersuasive, he may not do so arbitrarily, capriciously or

from a desire to favor one side against the other. There is nothing in the record to indicate why the wind evidence would have been found to be unreliable or irrelevant.

In considering the proper application of the "substantial evidence" test, the California Supreme Court said in *People v. Johnson*, 26 Cal. 3d 557, 577 (1980):

> A formulation of the substantial evidence rule which stresses the importance of isolated evidence supporting the judgment, however, risks misleading the court into abdicating its duty to appraise the whole record. As Chief Justice Traynor explained, the "seemingly sensible" substantial evidence rule may be distorted in this fashion, to take "some strange twists." "Occasionally" he observes, "an appellate court affirms the trier of fact on isolated evidence torn from the context of the whole record. Such a court leaps from an acceptable premise, that a trier of fact could reasonably believe the isolated evidence, to the dubious conclusion that the trier of fact reasonably rejected everything that controverted the isolated evidence. Had the appellate court examined the whole record, it might have found that a reasonable trier of fact could not have made the finding in issue. One of the very purposes of review is to uncover just such irrational findings and thus preclude the risk of affirming a finding that should be disaffirmed as a matter of law." (Traynor, The Riddle of Harmless Error (1969) p. 27.) (Fns. omitted.)

From the entire record the undisputed evidence may be summarized as follows: Trinkle sprayed paraquat a half-mile away, the wind was blowing away from the onions, Blair sprayed Pursuit onto the onions, someone else sprayed paraquat next to the onions on the day they were sampled 15 days later, paraquat was found on the onions, the onions were spotted but not necessarily from an herbicide, Pursuit would not have been detected on the onions. From this the hearing officer concluded that Trinkle sprayed the onions.

Assuming that the hearing officer disregarded the wind evidence, the remaining evidence was: Trinkle sprayed paraquat a half-mile away, Blair sprayed Pursuit onto the onions, someone else sprayed paraquat next to the onions on the day they were sampled 15 days later, paraquat

was found on the onions, the onions were spotted but not necessarily from an herbicide, Pursuit would not have been detected on the onions, therefore Trinkle sprayed the onions. We are unable to see from either set of facts how any substantial evidence supports the conclusion that Trinkle sprayed the onions.

The Department argues that the hearsay evidence proffered by Trinkle regarding the detection window of Pursuit should not be accepted "because it was offered at an informal administrative hearing with no lawyers participating (emphasis original)." To the contrary, precisely because it was an informal administrative hearing, hearsay evidence was accepted and considered by the hearing officer. Excluding hearsay evidence would also exclude the original complaint from Minetti, Trinkle's application to apply paraquat and the results of the tests done on the samples. Requiring Trinkle to comply with courtroom evidence rules while allowing the Department to offer hearsay evidence would be manifestly unfair.

It certainly is possible that spray from Trinkle drifted onto the onions. It is also possible that Blair accidentally or intentionally mixed paraquat with Pursuit when it sprayed next to the onions, or that Blair had failed to properly clean the tanks, or that some unknown nefarious individual intentionally sprayed paraquat onto the onions, or that whoever sprayed paraquat next to the onions on February 5th allowed the spray to drift onto the onions. But mere possibility is not legally sufficient substantial evidence, especially in light of undisputed facts that the wind was blowing away when Trinkle sprayed, and that someone else sprayed paraquat next to the onion field while the investigators were there.

By analogy, we can picture an officer called to the location of a dead body with a gunshot wound, and finding a crowd of people standing around, one of whom possesses a smoking gun. It is possible that a man in the next block sitting in his livingroom watching television, with a

gun on the desk next to him, shot the victim rather than the person with a smoking gun next to the body. Further investigation could prove this to be the case. But it stretches the imagination to consider the man in his living room to be the prime suspect, and there is certainly no substantial evidence that he committed the homicide.

The Department next claims that the trial court erred by requiring the Commissioner to investigate unreported paraquat applications, and prove that none occurred. We agree with the Department that the Commissioner should not be required to prove that no other unreported applications of paraquat occurred. However, the record contains evidence that someone sprayed paraquat right next to the onion field on the same day that samples were collected. At a minimum, this negates any presumption that no one else sprayed paraquat in the area. Even more, reports of someone spraying paraquat right next to the onion field is strong evidence that the residue found on the onions more likely came from that spraying than from Trinkle's spraying half a mile away. Nothing in the record indicates why the paraquat found on the onion samples was tied to Trinkle's application rather than the application on the adjoining field.

Considering the record as a whole, we find the Department's conclusion that the paraquat found on the onions came from Trinkle's spray clearly erroneous. The trial court correctly examined the entire record and found no substantial evidence to support the ruling of the hearing officer. The judgement issuing the Writ of Mandate is affirmed.

Dated: 12-9-04

Glade F. Roper, Presiding Judge

Gerald Sevier, by Special Assignment

Joseph Kalashian, by Special Assignment